No. 16,448

United States Court of Appeals

For the Ninth Circuit

GREGORIO ARCIAGA MESINA,
Appellant,

vs.

RICHARD C. HOY, Director of Immigration and Naturalization,
Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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BEHMAN-WALSH PRINTING CO., SAN FRANCISCO

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APPELLANT'S REPLY BRIEF.

In our opening brief, we argued that under 8 USC 1252(f) it was mandatory to reinstate the deportation order of 1936. Appellee in its brief argues that the government is free to disregard the order of 1936, and that it can and does base the present deportation order solely upon the new charge of having overstayed a non-immigrant's time limit. (R. 39, Findings; Appellee's Br. p. 9 ff.)

Appellee having chosen to contest the appeal on this basis, it is necessary to point out that the result must be the same either way. The record of the earlier proceeding is part of the present record (Pet. Ex.

5). For reasons stated in the opening brief and further developed below, this order is void and subject to collateral attack. The previous deportation order being void, appellant never legally interrupted his United States residence, made no new "entry" in 1956, and was never subject to the limitations of 8 USC 1251(a)(2), and 8 USC 1282.

This is true for the following reasons:

The charges under which the 1936 deportation proceedings were brought, were based on statutes which required either (1) *present* conduct; or (2) conduct "after entry".

(1) So far as present conduct is concerned, the following dates are significant.

(a) The Philippine Independence Act took effect May 14, 1935 (see below).

(b) The warrant on which the 1936 deportation was based was dated June 25, 1935 (R. 23, Ex. 5, Report of Hearing giving number of warrant as No. 55897/723, and date of warrant, as June 25, 1935; Warrant itself, following report, and dated June 25, 1935).

Consequently the conduct of appellant *as an alien* was limited to the narrow six-weeks period, May 14-June 25, 1935.

The record of the 1935 hearing (Ex. 5) *contains no evidence placing any acts of appellant within that period,* but does contain testimony limiting his alleged conduct to a time previous to May 14, 1935, *when appellant was not an alien but a United States National.*

(2) So far as appellant was charged in 1935 with acts "after entry", they were not grounds of deportation for a Filipino at all. (*Barber v. Gonzales,* 347 U.S. 637; *Mangoaong v. Boyd,* 205 F. 2d 553 (CA 9).)

We shall first point out the arguments of our opening brief which the appellee does not even attempt to answer or which it misstates; and then we shall show, that the 1936 deportation involved a "gross miscarriage of justice" in that appellant was summarily treated as being and having been an alien for all purposes when in fact he had been a United States National during part of the time involved and never an alien for all purposes—and this partly upon evidence which has itself been held to invalidate the proceedings.

Then we shall review the present status of the 1935-6 deportation order; then we shall show that this order should be held invalid even under the appellee's own authorities.

I. POINTS NOT ANSWERED BY APPELLEE OR MISSTATED.

A. Argument Not Answered.

Appellee makes no specific answer to the recital of the unfairness of the 1935 deportation hearing. (Appellant's Op. Br. pp. 9-18.) Appellee contents itself with the single sentence at appellee's brief p. 15:

> "It is submitted that, considered as a whole, the record of the 1935-1936 proceedings involving appellant, as contained in Exhibit 5 attached to the

> Certified Administrative Record, most clearly does not indicate a gross miscarriage of justice."

Daskaloff v. Zurbrick, 103 F. 2d 579 (CCA 6) is cited, which we discuss below.

In particular, appellee makes no answer to the point that the use at the 1935 hearing, of *ex parte* statements, taken out of the presence of appellant, rendered that hearing unfair, and subject to collateral attack on *habeas corpus.* The cases on this point are collected at appellant's opening brief, p. 16. Appellee does not so much as mention one of them, or discuss their impact on the case.

B. Misstatement by Appellee.

At appellee's brief, p. 16, appellee misstates our contentions. It is said,

> "there is no dispute that appellant is an alien *who entered* as a crewman and has overstayed his time * * *". (Italics added.)

It *is disputed* that appellant "entered" in 1956.

We have already indicated our position that if the 1935-6 deportation was illegal and void, it did not constitute a deportation, but that nevertheless appellant's departure was undeniably not voluntary under 8 USC 1101(a)(13). Appellee's return in 1956 would therefore not constitute an "entry". Compare *Delgadillo v. Carmichael,* 332 U.S. 388; and *Barber v. Gonzales,* 347 U.S. 637.)

II. PRESENT STATUS OF 1935-6 DEPORTATION PROCEEDINGS.

A. Appellee's Argument as to Status of 1935-6 Deportation Order.

1. Appellee cites three cases on the vulnerability of a prior deportation. (Appellee's Br. pp. 13, 15.) These are *De Souza v. Barber,* 263 F. 2d 470; *U.S. ex rel. v. Carmichael,* 183 F. 2d 19 and *Daskaloff v. Zurbrick,* 103 F. 2d 579. These contain dicta as to when an earlier order may be attacked.

De Souza v. Barber, 263 F. 2d 470, 475 quotes the *Carmichael* case to the effect that there must be "a gross miscarriage of justice"; and quotes *Bilokumsky v. Tod,* 263 U.S. 149, 157, "that the defects" must have been such as "might have led to a denial of justice".

De Souza v. Barber, 263 F. 2d 470, 475 also refers to *Daskaloff v. Zurbrick,* 103 F. 2d 579, which indicates an even broader rule. There the Sixth Circuit declined to review an earlier deportation, but on the ground that upon the previous record "it does not appear that there was *an application of an erroneous rule of law*". (Italics added.) Inferentially, application of an "erroneous rule of law" is enough to make the first deportation subject to review.

2. Appellee also quotes the reference to 8 USCA 1101(g) which appears in *De Souza v. Barber.* (Appellee's Br. pp. 14, 16.) As we shall show, this section had a much narrower scope at the time of the Philippine Independence Act (45 Stats. at L. 1551), and its application here would raise the question left undecided in *Mangoaong v. Boyd,* 205 F. 2d 553, 556—whether the Philippine Independence Act incorporated not only existing but future immigration laws.

3. Appellee also quotes language from *U.S. ex rel. v. Carmichael,* 183 F. 2d 19, 20 that in testing the validity of the earlier deportation order, no account may be taken of changes in the law resulting from overruling decisions. (Appellee's Br. p. 17.) But there was no change in the law in the present case. As we shall show below, all relevant points of law have always been decided one way—against the validity of the 1935-6 deportation.

Questions depending upon the Philippine Independence Act were then new. Appellee does not claim that there were any Court decisions tending to uphold the deportation—rather it attempts to lift itself by its bootstraps by citing the 1935-6 proceeding as itself establishing "the law". (Appellee's Br. p. 17.) Since the questions have reached the Courts, relevant holdings have been against the government's contentions. On other phases of the case the law had already been crystallized against the validity of the proceeding.

B. Effect of Availability of Habeas Corpus.

1. *Habeas Corpus* is the statutory mode of attacking a deportation order (28 USC 2241). But habeas corpus is itself a collateral attack on the judgment or order in question. (*Herndon v. Lowry,* 301 U.S. 242, which contrast with *Herndon v. Georgia,* 295 U.S. 441; *Mooney v. Holohan,* 294 U.S. 103; *Moore v. Dempsey,* 261 U.S. 86.)

Lapse of time is ordinarily no objection to the granting of the writ (*Mooney v. Holohan,* 294 U.S. 103) nor is the fact that the order or judgment has be-

come final, either after appeal (*Herndon v. Lowry,* 301 U.S. 242) or without appeal (*Moore v. Dempsey,* 261 U.S. 86).

Appellee has not cited any statute of limitations specially governing *habeas corpus* in deportation proceedings, and we have found none.

2. The grounds which support *habeas corpus* are therefore, by definition, grounds for collateral attack on the prior deportation order. Where collateral attack is available at all, it is immaterial that appellant did not pursue other remedies which would have assumed the deportation to be valid. (Cf. Appellee's Br. pp. 12, 14.)

III. PRIOR DEPORTATION ORDER ENTAILED APPLICATION OF AN "ERRONEOUS RULE OF LAW", "GROSS MISCARRIAGE OF JUSTICE", UNDER CITED DECISIONS.

In showing that the 1935-36 deportation order involved a "gross miscarriage of justice", and *a fortiori,* "An application of an erroneous rule of law" we shall show *first,* the legal status of Filipinos, and that the 1935-6 proceedings completely disregarded that status; and *second,* that the procedure in the 1935-6 case violated elementary and well-settled rules.

A. 1935-6 Deportation Proceedings Disregarded Legal Status of Filipinos.

In showing that the 1935-6 deportation proceedings wholly disregarded the special status of Filipinos, we shall first summarize the applicable law, and then refer to the record (Exh. 5) to show that this law was disregarded.

1. Law Applicable to Filipinos.

a. Appellee cites *Cabebe v. Acheson,* 183 F. 2d 795, 799, to the effect that the Philippine Independence Act took effect on May 1, 1934. (Appellee's Br. p. 16.) But both before and subsequently, the Ninth Circuit has held that the Philippine Independence Act took effect on May 14, 1935. (*Del Guercio v. Gabot,* 161 F. 2d 559, 560; *Mangoaong v. Boyd,* 205 F. 2d 553, 554.)

Hackworth's Digest of International Law, vol. 1, ch. 4, pp. 495-7 also takes the 1935 date as the effective date.

Before the effective date of the Independence Act, *Filipinos* were American Nationals, not aliens. *Rabang v. Boyd,* 353 U.S. 427; *Barber v. Gonzales,* 347 U.S. 637.

b. (1) In the 1935-6 proceeding, appellant was charged with managing a house of prostitution, and with receiving the earnings of a prostitute. (Ex. 5.) The statute as of that time was in the present (or future) tense—it dealt with *current activity.*

See Immigration Act 1917, 39 Stats. at L. 874, sec. 19 (p. 889):

> "Any alien * * * who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather * * *"

Mangoaong v. Boyd, 205 F. 2d 553, 555 holds that such a statute, cast in the present tense, requires a

Filipino *to have been an alien when the acts charged were committed,* in order to be deportable.

As already stated, the warrant in the 1935-6 proceeding was issued June 25, 1935. *Consequently that deportation order could have been legally based only on acts committed in the narrow six-weeks period between May 14, 1935 and June 25, 1935.*

(2) If subsequent amendments to the deportation act are of any importance, the present statute dealing with prostitution is an "after entry" act, 8 USC 1251 (a)(12); 8 USC 1182(a)(12).

"After entry" statutes do not apply to Filipinos who entered before the Philippine Independence Act. *Barber v. Gonzales,* 347 U.S. 637. (Appellant came to the continental United States in 1931, Ex. 5, Warrant; testimony of Appellant, p. 3 of hearing transcript.)

2. Record of Prior Deportation Disregards Status of Filipinos.

As already indicated, the valid proof in the 1935-6 deportation proceedings was limited to the short period, May 14-June 25, 1935. Otherwise appellant would have been deported (and would now be deported) for *acts done when he was not an alien.* (This distinguishes the present case from those cited by appellee—*De Souza v. Barber,* 263 F. 2d 470; *U.S. ex rel. Steffner v. Carmichael,* 183 F. 2d 19; *Daskaloff v. Zurbrick,* 103 F. 2d 579. In each of these the individual was an alien for all purposes: in *De Souza,* a Portuguese; in *Steffner,* a Swede; in *Daskaloff,* a Bulgarian. Filipinos present special problems.)

But the evidence on the 1935-6 hearings was not directed to the period May 14-June 25, 1935. *Apparently the case was tried on the theory that a Filipino was and always had been an alien for all purposes.* Compare page 2 of the hearing in Exhibit 5, which lists among those present, "Gregorio Messina, Alien". This designation is repeated throughout the exhibit. Not only was the evidence not related to the dates May 14-June 25, 1935, but where such evidence was related to specific dates, these *dates fell before May 14, 1935.*

The evidence consisted of two parts: (1) *ex parte* statements of witnesses taken by the immigration examiner out of the presence of appellant or his counsel; and (2) testimony of these witnesses at the hearing. (There were two *ex parte* statements of declarants who were not called as witnesses.)

We shall review *all* of this evidence in Exhibit 5, and show that *none* of it is tied to the six weeks, May 14-June 25, 1935.

In our next section we go into the additional points that use of the *ex parte* statements itself made the hearing unfair, and that this was aggravated by the fact that on the hearing the witnesses denied many of the statements which they had made *ex parte.*

a. *Gregorio Messina* (sic)—asked only about name, place and date of birth and date of entry into the U.S.

b. *Isabel Roman* (p. 4 of transcript of hearing in Ex. 5) testifies on Sept. 3, 1935:

"Q. Is it true that the house of George Messina (sic) has never been a house of prostitution?

A. I don't know.

Examining Officer:

Q. But the truth of the matter is that you were paying Messina for room and board and to pay him you had intercourse with men to get money. Is that correct?

A. Yes, sir.

Q. When was that?

A. *About six months ago*". (Italics added.)

Six months before Sept. 3, 1935, was March 1935—*a time when Appellant was still for all purposes a national of the United States.*

The Immigration Service took an *ex parte* statement from this witness (Isabel Roman) on August 6, 1935. It is attached to the record of the 1935 hearings (Ex. 5) and within that Exhibit, is designated "Exhibit 'B' ". This statement includes the following:

"Q. Have you ever lived in the house of the Filipino known as Messina?

A. Yes, I lived once there because he found me on the streets and took me over to his house.

Q. *How long did you live in his house?*

A. *27 days.*" (Italics added.)

There is no other identification of time in this *ex parte* statement. But coupling it with the testimony at the hearing ("about six months ago") shows that *the entire time referred to* was evidently *before May 14, 1935.*

c. *Maria Luisa Portel*—testified Sept. 13, 1935—(her testimony begins on p. 6 of the hearings included in Exhibit 5):

(p. 7.)

"Q. Tell me: How long have you been living in the house of George Messina?

A. About five months.

Q. Did George Messina use his house for the business of prostitution?

A. No, never."

The Immigration Service took this witness's *ex parte* statement on August 20, 1935. The statement is marked Exhibit "E", within *Exhibit 5*. There the witness said:

"Q. How long have you been living in Messina's house?

A. I have been living in his house for about five months."

"Five months" on August 20, means from March to August.

"Q. During the time that you have been living in his house, have you seen prostitutes coming there?

A. Yes, sir."

There is no further identification of time. It was important to fix the time after May 14, 1935. The statement does not do so. (This is quite apart from the fact that the witness repudiated this statement at the hearing—see above.)

d. *Gregorio Laguna,* p. 7 of hearing transcript in Exhibit 5 (testifying on Sept. 13, 1935—see id. p. 6;

called by appellant) testifies that the appellant's house is not a house of prostitution.

e. *Jenaro de Jesus,* p. 10 of hearing transcript in Exhibit 5 (called by appellant) has known appellant since July 26, 1935; testifies that house of appellant is not a house of prostitution. (p. 11.)

f. *Petra Reys de Mateo,* p. 12 of the hearing transcript included in Exhibit 5 (called by appellant) testifies that his home is not a house of prostitution.

g. *Juan Gonzales Feliciano,* p. 13 of hearing transcript, in Exhibit 5 (called by appellant) testifies that Messina's house is not a house of prostitution.

h. *Petra Rivera Cruz,* p. 15 of hearing transcript in Exhibit 5 (called by appellant), testifies that his house is not a house of prostitution.

i. *Alba Rosario,* p. 17 of hearing transcript, Exhibit 5 (called by appellant) testified that appellant's house is not a house of prostitution.

j. *Jorge Pagan,* called at foot of p. 19, testimony begins on p. 20 of hearing transcript, Exhibit 5 (called by appellant), testified that appellant's house was not a house of prostitution.

k. *Alex Abraham,* p. 21 of hearing transcript, Exhibit 5 (called by appellant), testified that appellant's house was not a house of prostitution.

l. *Maria Luisa Perez,* p. 22 of hearing transcript in Exhibit 5:

"Q. What is your business or occupation?
A. I am a prostitute."

* * * * * * *

"Q. Did you live with a Filipino in the house of George Messina?

A. Yes, I was living there with a Filipino, but I was doing business."

No date is mentioned at all.

The witness gave an *ex parte* statement to the immigration authorities on August 8, 1935. It is marked "Exhibit 'C' ", included in Exhibit 5. There the witness said:

"Q. What is your occupation?

A. I am a business woman (prostitute).

Q. How long have you been a prostitute?

A. About six years.

* * * * * * *

Q. Do you know one Filipino known by the name of Jorge or George Messina?

A. Yes, sir, I have lived in his house.

Q. When were you living in his house?

A. *From Jan. 1934 to Jan. 1935.*"

(Italics added.)

This definitely fixes the time *previous to May 14, 1935.*

m. *George Messina* (recalled, p. 24 of hearing transcript in Exhibit 5, September 17, 1935) testifies that he did not operate a house of prostitution—only a regular boarding house.

n. *Martin Burgos* (foot of p. 26 of hearing transcript in Exhibit 5; testimony begins on following page):

"Q. To your knowledge is the house of George Messina a house of prostitution?

A. I don't know that.

* * * * * * *

Q. Did you or did you not say that the house of the Filipino was a house of prostitutes?

A. No, I did not say that."

o. *Clerk José Ramirez* (p. 28 of hearing transcript in Exhibit 5):

"Q. Mr. Ramirez, please relate in your own words as near as possible the entire conversation that took place in the house of Martin Burgos.

A. This morning at about 10:30 A.M. * * * Then Burgos told Mr. Leith that he was insulting him as well as those two girls because his house was a decent and respectable, but that the house of the Filipino was a house of prostitutes and he refused to make any further statements in this respect. * * *"

Martin Burgos (recalled, p. 30 of hearing transcript in Exhibit 5):

"Q. And you did not tell him that the house of the Filipino was a house of prostitutes?

A. Nothing about it. I told him I was a Puerto Rican and that there were no Filipinos there. Then he went up in the air. I was not drunk."

If the hearsay statement of José Ramirez be taken to refer to the time it was spoken (Sept. 12, 1935) it is the only item which refers to a time subsequent to May 14, 1935. (It would also refer to a time subsequent to the warrant, June 25, 1935.) This was denied

by the person to whom it was attributed (Martin Burgos).

The following *ex parte* statements were also introduced, without any attempt to call the witnesses who gave them:

Maria Rodriguez Caraballo (designated Exhibit "A" as part of Exhibit 5); the *ex parte* statement was given August 21, 1935, *at the Women's Ward of the Insular Sanatorium Rio Piedras, P.R.*

"Q. Do you know George Messina?
A. Yes, sir.
Q. How long have you known him?
A. About one year.

* * * * * * *

Q. Did you know Isabelita?
A. I know her by name.

* * * * * * *

Q. What was the reputation of Isabelita?
A. I don't know.
Q. Was she a prostitute?
A. I think so.

* * * * * * *

Q. During the time you lived in the house of Messina, did any prostitute go there?
A. Yes, I have seen several.

* * * * * * *

Q. How long have you been a prostitute?
A. About three years.
Q. Did you do business with men in the house of Messina?
A. Yes, sir.

* * * * * * *

Q. Did Isabelita live there at the same time?
A. Yes.
Q. What other women lived there?
A. Maria Luise and Aurora.

* * * * * * *

Q. Then, you know that Messina lived on what prostitutes earned?
A. Yes, sir.
Q. Did Messina know you were prostitutes?
A. Yes.

* * * * * * *

Q. Was this woman called Aurora a prostitute?
A. Yes, sir.

* * * * * * *

Q. *How long have you been here?*
A. *About five months.*" (Italics added.)

If, on August 21, 1935, the girl had been in the sanatorium for five months, then all the occurrences to which she testified could have taken place no later than March, 1935. Consequently she testified to *nothing after* the crucial date of May 14, 1935.

The *ex parte* statement of *Josefina Ruiz* was taken on August 20, 1935. It is denominated Exhibit "D", in Exhibit 5. This contains the following:

"Q. Did you live with Messina when he hired a house of prostitution in La Marina?
A. Yes, sir.
Q. That was a house of prostitution, is that correct?
A. No, sir.

* * * * * * *

Q. Is Messina's house in Boulevar 8½ a house of prostitution?

A. No, sir, it has never been.

* * * * * * *

Q. During the time that you have lived there have any prostitutes lived there?

A. Only a girl by the name of Isabel, she is blond-haired, but we took her out of our house when we knew she was a prostitute.

Q. Did a girl by the name of Maria Luisa live in that house too?

A. Yes, sir.

Q. Are these two women prostitutes or whores?

A. Yes, sir.

Q. Did any of these two women give Messina any money out of the money they got from the men?

A. No, sir, they were boarding in our house. Maria Luisa, for example, paid $3.00 monthly for the rent of a room. Later she knew a Filipino by the name of Bonifacio Alisi, who took this girl to live with him. As they continued living together in the same room, Bonifacio Alisi paid Messina $25.00 monthly for boarding and room in behalf of Maria Luisa.

Q. Did she receive men in her room?

A. No, sir, except that once I was told by a near neighbor that she took a policeman into her room. When I knew it I immediately took her out of our house.

Q. Do you know whether she was a prostitute?

A. No."

The above is a complete recital of the evidence given at the 1935 hearing. We have made no distinction

between testimonial evidence and *ex parte* hearsay statements.

This review shows that *the entire case was conducted on the supposition that a Filipino was an alien at all times and for all purposes.* There is no evidence of any acts subsequent to May 14, 1935, except the hearsay statement of Ramirez (denied by Burgos) that Burgos told him that Messina's house was a house of prostitution. Even as to this it is only an inference that the supposed statement related to the (then) present time (which would have fixed it *after the date of the warrant*). But such a hearsay statement, if used merely as impeachment, establishes nothing and used as evidence, invalidates the hearing.

We now briefly touch this point.

B. 1935-6 Deportation Proceedings Unfair on Their Face.

1. a. Five *ex parte* statements were used against the appellant in the 1935 hearing. *The makers of two of these were not even called as witnesses.*

In addition there was the hearsay statement of Ramirez as to what Martin Burgos had supposedly said (which Burgos denied saying).

The cases cited on page 16 of appellant's opening brief show that the use of *ex parte* statements is *itself enough to invalidate a hearing.*

b. We may add one observation. At the hearing the witness Maria Luisa Portel testified that even such statements as she did make *ex parte* to the effect that appellant's house had been a house of prostitution,

were made in response to threats. (Ex. 5, p. 6 of hearing transcript.)

> "Q. This statement will be read to you in the Spanish language." (Statement referred to read in Spanish by Examining Officer.) "Is that statement true and correct?
>
> A. Some of these are true and some untrue. Look, the sheets referred to in that statement were dirty but not stained with semen.
>
> Q. Then why did you declared (sic) that they were dirty with semen?
>
> A. Because you (pointing to stenographer Ramirez) threatened me. It is a lie that men were there with prostitutes and you threatened me stating that you were going to send me to jail.
>
> Q. In what way were you threatened?
>
> A. You (meaning clerk Jose Ramirez) threatened me, that is the truth.
>
> Q. In what way did the stenographer threaten you?
>
> A. The stenographer stated that he was going to send me to jail.
>
> Q. What was he going to send you to jail for?
>
> A. If I don't testify to the truth."

The acting chairman of the board of review ("Warrant Proceedings", p. 3) derides this testimony saying:

> "In other words, she virtually said that because she had been told that she might be sent to jail if she testified falsely under oath she therefore decided to, and did, testify under oath in part falsely and in part correctly. Such a claim is not understood. . . ."

But exactly this kind of threat was held to be an element invalidating an immigration hearing in *Ex parte Chin Loy Yow,* 223 F. 833, cited on page 16 of appellant's opening brief. There the District Court of Massachusetts said:

> (p. 835.) "During that trial Hop Lee was called as a witness and *after a threat by the United States Officers to accuse him of crime if he did not tell the truth,* and a promise of immunity from prosecution if he did tell the truth. . . ." (Italics added.)

Similar statements (" 'their solemn promise that the law would be carried out' "; " 'the law should take its course' "; " '* * * let the law take its course, that justice would be done and the majesty of the law upheld' ")—were held to be elements indicating the *prevalence of a mob spirit* in *Moore v. Dempsey,* 261 U.S. 86, 88-90.

2. At the time both of the enactment and of the effective date of the Philippine Independence Act (1934, 1935) the provision now incorporated in 8 USC 1101(g) *applied only to the criminal prosecutions* under what was first 45 Stats. at L. 1551 (ch. 690), sec. 1 (later 8 USC 180). This act made the language "shall be considered to have been deported in pursuance of law" applicable only "for the purposes of this *section.*"

The 1952 redraft (now 8 USC 1101(g)) for the first time made the provision applicable "for the purpose of this *chapter*" (i.e. the entire chapter on immigration.) So if any weight is to be given to this provision

in the present case, it will again raise the question whether the Philippine Independence Act intended to incorporate then existing immigration laws or also all future laws. (Cf. *Mangoaong v. Boyd,* 205 F. 2d 553, 556.)

It should be added that even in *De Souza v. Barber,* 263 F. 2d 470, 475, which involved an outright alien (Portuguese) rather than a Filipino, this Court cited 8 USC 1101(g) only as a makeweight.

Examination of the statutory language indicates that the section was intended merely to eliminate any distinction between the effects of a deportation and a voluntary departure. This is implied in the clause "*left* the United States", and the phrase "irrespective of the source from which the expenses of his transportation were defrayed * * *".

Viewed in this light, the section is beside the point when the contention is made that the first deportation is illegal and void.

C. No Changes of Law Involved.

At page 17 of appellee's brief, appellee tries to bring this case within the "change of law" rule of *U.S. ex rel. Steffner v. Carmichael,* 183 F. 2d 19 (lower Court cases holding prohibition of communist membership extended to past membership, disapproved in *Kessler v. Strecker,* 307 U.S. 22).

But there was no change of law in the present case.

1. The rules of fairness were established long before 1935. The following cases, cited in our opening brief, were decided before 1935:

a. Ex Parte Statements.

(Cases in Appellant's Br. p. 16)
Ungar v. Seaman (1924), 4 F. 2d 80;
Whitfield v. Hanges (1915), 222 F. 745;
Schenck v. Ward (1934), 6 F.S. 739;
Ex parte McMahon (1924), 1 F. 2d 456;
Ex parte Chin Loy Yow (1915), 223 F. 833;
Gonzales v. Zurbrick (1930), 45 F. 2d 934;
Svarney v. U.S. (1925), 7 F. 2d 515;
Maltez v. Nagle (1928), 27 F. 2d 835.

b. Constitutional Importance of Interpreter.

Gonzales v. Zurbrick, supra,

and

Appellant's Opening Brief, p. 12.

2. There has been no change in the law regarding the status of Filipinos. Appellee does not claim that there have been any judicial decisions holding Filipinos to be aliens before 1946. It has cited no such cases. Instead it profers the administrative holding itself (which did not even consider the point) as establishing the "law". See appellee's brief page 17:

> "It cannot be contended that the interpretation of the law between 1934 and 1946 *indicated by appellant's original deportation* was not the correct interpretation". (Italics added.)

Since the decision does not discuss the legal status of Filipinos, it would be no authority from the standpoint of *stare decisis,* even if it had been the holding of an upper Court. (*U.S. v. Mitchell,* 271 U.S. 9, 14; *New v. Oklahoma,* 195 U.S. 252, 256.)

Consequently, the administrative holding of 1935 does not establish any law. The Philippine Independence Act had just become effective at the time, so there were as yet no judicial decisions. If the administrative hearing of 1935 shows anything, it shows an undue anxiety to treat Filipinos as aliens, regardless of the language used by Congress. Ever since judicial decisions have come out, they have been uniformly to the effect that *Filipinos were not aliens before 1946;* that they were to be treated as aliens only for certain purposes; that their arrival in the continental United States prior to the enactment of the Philippine Independence Act did not constitute an "entry"; and that under a statute couched in the present tense acts for which a Filipino might be deported must have been done at a time when he was an alien or was to be treated as an alien for the purposes of those acts.

The ruling in the 1935 deportation cases was not made on the basis of decisions subsequently overruled, but in simple disregard of the act of congress (as later uniformly construed by all Courts) defining the status of Filipinos.

IV. CONCLUSION.

The cases declare that an earlier deportation may be reviewed when there has been "Application of an erroneous rule of law" or "gross miscarriage of justice".

The 1935 deportation proceedings unquestionably applied an erroneous rule of law. We submit they

also entailed a gross miscarriage of justice. It is a gross miscarriage of justice to deport a Filipino as an alien, without even inquiring into his true status, especially when there was *no legal testimony that he had committed any deportable act during the period when he "shall be considered as if he were an alien".*

In addition to this, the 1935 proceeding was unfair and subject to collateral attack in being based largely on *ex parte* statements; in having an interpreter who assisted the government's investigation, and in having the same official act as prosecutor and judge.

Since the 1935-6 deportation was a "gross miscarriage of justice" and therefore subject to collateral attack, the appellant's arrival in 1956 was a continuation of his previous legal residence and not an "entry". The judgment of the District Court should be reversed with directions to enter judgment for the appellant.

Dated, San Francisco, California,
December 30, 1959.

Respectfully submitted,
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